IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6604 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SHERKHAN @ SHERU SARDARKHAN PATHAN

Versus

COMMISSIONER OF POLICE

Appearance:

MS DR KACHHAVAH for Petitioner

MR UR BHATT, APP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 19/03/98

ORAL JUDGEMENT

By this petition, under Article 226 of the Constitution of India, the petitioner who is the detenu, calls in question the legality and validity of the order of detention passed by the Commissioner of Police,

Ahmedabad City on 19th August, 1997, invoking his powers under Section 3(2) of the Prevention of Anti-Social Activities Act (hereinafter referred to as "the Act").

2. The facts in brief leading the present petitioner to prefer this application may be stated. The Commissioner of Police, after studying the papers and complaints lodged against the present petitioner, found that the petitioner was a fiend and by his nefarious activities, he was, often giving rise to feacas and thereby, disturbing the public order. He was often committing theft, robbery, and possessing different weapons without any pass or permit for committing the wrongs and used to cause damage to the properties or injuries to the persons, who failed or refused to bend his way. He was, by his nefarious activities, disturbing public order. His hellish and infernal activities disturbing public order were going berserk and that could be noticed by the Commissioner of Police, when he found that about 10 cases against him were registered in different Police Stations and in all those cases he is alleged to have committed the offence of theft of huge amounts. Certain other complaints were not registered, but the Commissioner of Police found that the petitioner had committed different criminal wrongs, putting the people in the fear of instant death or hurt. He, therefore, thought to check his activities disturbing the public order. Stricter measures were required to be taken. He tried, through his members of the staff, to get the statements recorded, but no one was willing to come forward to give his statements, because of the fear of violence endangering his safety. However when assurance was given to those witnesses, with great tension, they gave statements, and studying those statements, the Police Commissioner found that to curb the anti-social, subversive and chaotic activities of the petitioner, unspeakable diabolism terrorising the society, and upsetting the public order and leading to anarchy, when ordinary law was falling short and was sounding dull, it was not possible to check the activities. He, therefore, thought it fit to pass the impugned order in question, consequent upon which the petitioner is arrested and at present is kept under detention.

3. While challenging the order, the petitioner has raised several grounds, but, at the time of hearing, the learned advocate representing the petitioner confined to the only point namely exercise of privilege under Section 9(2) of the Act, going to the root of the case. Both the parties, therefore, submitted on that point. I will,

therefore, confine to that point only.

4. Before I proceed, it would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts, but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from some constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated

as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, w/o Ibrahim Abdul Rahim Alla Vs. State of Gujarat and Others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

5. In view of such law, the authority passing the detention order has to satisfy the Court that it was absolutely necessary in the public interest to suppress the particulars about witnesses keeping their safety in mind. It is also necessary to show that the authority applied his mind to the factors emerging on record. No doubt, Mr. P.G.J.Namputhiri, Commissioner of Police and Mr. J.R.Rajput, Under Secretary, Government of Gujarat, (Home Department), have filed their affidavit explaining the circumstances which led him to exercise the discretion available under Sec.9(2) of the Act, but on going through the same, nowhere explanatory statement about the privilege exercised is found. On the contrary, reading the order and affidavits, it appears that the task about inquiry qua fear expressed by the witnesses was entrusted to other officers and whatever the other officers reported has been mechanically accepted. It also appears from the affidavits is that the Police Commissioner was having the full trust in the officers to whom the task to inquire was entrusted and assuming that everything must be in order and honestly reported, he accepted the report and the opinion expressed therein which is neither sufficient nor legally permissible. In fact, therefore, there is no personal application of mind for being satisfied about the exercise of the privilege. The subjective satisfaction is vitiated. In short, the case about the non-disclosure exercising the privilege under Section 9(2) is not made out, and therefore, the continued detention is illegal. The petitioner for want of those particulars could not make effective representation and when his right to make affidavit

effective representation has been jeopardised, the continued detention must be held to be unconstitutional and arbitrary. The same being illegal is required to be quashed.

6. For the aforesaid reasons, this petition is allowed. The order of detention passed on 19th August, 1997, by the Police Commissioner, Ahmedabad City, is hereby quashed and set aside and the petitioner-detenu is ordered to be set at liberty forthwith, if not required in any other case. Rule accordingly made absolute.

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